

CUMULATIVE DIGEST

CH. 27 IDENTIFICATION

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§27-1

Identification Procedures Generally

Perry v. New Hampshire, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2012) (No. 10-897, 1/11/12)

1. Generally, the admissibility of evidence is determined by state and federal statutes and rules. In addition, juries are responsible for determining the weight to be given to evidence admitted at trial. Due process restricts the admission of evidence only if the evidence is so unfair that its consideration by the trier of fact would violate fundamental concepts of justice.

2. The due process clause is implicated in the admission of suggestive eyewitness identification testimony only if police misconduct caused the suggestiveness. Even where police use a suggestive identification procedure, however, suppression of the identification is not inevitable. Instead, Supreme Court precedent mandates a case-by-case examination to determine whether the indicia of reliability concerning the identification outweigh the corrupting effect of suggestive conduct by law enforcement. In determining the reliability of an identification, courts consider factors such as the witness's opportunity to view the criminal at the time of the offense, the witness's degree of attention, the accuracy of the witness's prior descriptions of the criminal, the level of certainty demonstrated by the witness at the time of the confrontation, and the time lapse between the crime and the confrontation.

3. The court rejected the argument that any identification testimony that might be tainted by suggestiveness must be screened for reliability before it is admitted, even where the suggestiveness was not caused by the police. The court noted that its precedent concerning suggestive eyewitness identification is intended to deter police from using suggestive lineup procedures. Where suggestiveness was not caused by police officers, no such deterrent effect is possible. Furthermore, where the suggestiveness is caused by sources other than the police, the defendant has adequate means to respond through other constitutional safeguards such as the rights to counsel, compulsory process, confrontation, and cross-examination.

4. The trial court did not err by failing to make an initial determination whether eyewitness identification evidence was unreliable. A witness who was being questioned by a police officer in her apartment happened to look out the window, and told the officer that the person she had seen breaking into cars was standing in the parking lot next to a police officer. Even if the event amounted to a single-person show-up at which defendant was likely to be identified, the suggestiveness did not result from any action by the police. Therefore, the due process clause was not implicated.

The court also noted that defense counsel challenged the reliability of the identification before the jury, and the trial judge gave a lengthy instruction on eyewitness identification and the factors to be used in evaluating it.

People v. Faber, 2012 IL App (1st) 093273 (No. 1-09-3273, 6/26/12)

1. 725 ILCS 5/107A-5(a) provides that all lineups must be photographed, and that such photographs and any photographs shown to eyewitnesses during photo spreads must be disclosed during discovery. Section 107A-5 was violated where defense counsel requested a photo array that had been shown to eyewitnesses, but the State could not tender a copy of the array because it had been lost after a co-defendant's trial.

2. As a matter of first impression, the court concluded that although §107A-5 was violated, suppression of testimony concerning the photo array was not mandated. The court

found that §107A-5 is directory rather than mandatory.

Statutory language is presumed to be directory unless: (1) the statute prohibits further action in the event of noncompliance, or (2) the right protected by the statute would be harmed under a directory reading. The statutory language of §107A-5 does not prohibit further proceedings in the event the State fails to disclose a photo array. Furthermore, although the statute is intended to protect a fair trial, admission of a suggestive photo array constitutes reversible error only if the defendant was prejudiced.

Because defendant gave a statement admitting that he had been the shooter, and he was identified as the shooter by two eyewitnesses, the court concluded that there was at most minimal prejudice from the admission of testimony concerning the photo array. Because the right to a fair trial was not affected by the failure to disclose the array, a directory reading of §107A-5 was appropriate.

The court noted, however, that the State's failure to preserve the photo array was "very disturbing." Furthermore, in a case in which the evidence in a case is closely balanced, "it may be that the correct remedy is to suppress the identification testimony."

3. The court rejected defendant's argument that apart from §107A-5, as a matter of common law the trial court should have suppressed testimony concerning the lost photo array and the subsequent lineup identifications. The mere fact that the photographs were lost does not justify reversal of the conviction; unless bad faith is shown, the failure to preserve potential evidence does not deny due process. Instead, the relevant question is whether under the totality of the circumstances the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

The trial court found that the loss of the photo array was inadvertent, and that the State diligently attempted to track down the array once it was discovered to be missing. In addition, there was testimony that the array was composed of similar-sized photographs of males of the same age and general appearance as the defendant. The court concluded that under these circumstances, the trial court's finding upholding the identification procedure was not against the manifest weight of the evidence.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Kerry Goettsch, Elgin.)

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Right to Counsel

People v. Lewis, 2015 IL App (1st) 130171 (No. 1-13-0171, 5/12/15)

Defendant's Sixth Amendment right to counsel did not attach when he was arrested and arraigned for extradition proceedings in Nevada pursuant to an Illinois arrest warrant. Extradition is a summary ministerial procedure designed to return a fugitive to another State so he may stand trial. An extradition hearing does not commence adversary proceedings and is not a critical stage for Sixth Amendment purposes.

The Court rejected defendant's argument that the extradition hearing was a critical stage because the State at that point committed itself to prosecution. Although defendant was brought before a judicial officer during the hearing, the State had not yet charged him with a crime. The only purpose of the hearing was to transfer defendant to Illinois pursuant to an

arrest warrant. Because defendant was not formally charged until he was returned to Illinois and identified in a lineup, the extradition hearing did not entail adversary proceedings against him.

The denial of the motion to suppress lineup identification was affirmed.

People v. White, 395 Ill.App.3d 797, 917 N.E.2d 1018 (1st Dist. 2009)

1. A criminal defendant has a Sixth Amendment right to counsel at a post-indictment or information lineup. As an issue of first impression, the Appellate Court held that the right to assistance of counsel at a post-indictment lineup includes the right to have counsel actually observe the identification. Thus, if defense counsel is permitted to come to the police station but required to stand outside the witness room, and is therefore unable to observe the identification, a Sixth Amendment violation occurs.

The rule allowing counsel to attend a post-indictment lineup has two purposes: (1) to safeguard against the inherent risk of suggestion present in all lineups, and (2) to allow the accused to detect any unfairness in the confrontation. The court held that the former purpose is completely frustrated if counsel is not allowed to observe witnesses as they are making an identification:

[D]efense counsel would have no way of knowing whether the witness was improperly led or whether the witness was hesitant or unsure in his identification, and he would not know what language or expressions the witness, police, or State's Attorneys used in the identification process. These facts could have been of great significance in [cross-examination]. . .

The court acknowledged the State's concerns about witness intimidation and the need to preserve witness identify in certain, but said that such interests could be protected by masking witnesses while conducting lineups.

2. However, the court concluded that defendant's Sixth Amendment right to counsel had not attached at the time of the lineup. Under **Rothegery v. Gillespie County, Texas**, 554 U.S. ___, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008), the right to counsel attaches at the initiation of adversarial judicial proceedings by way of formal charge, preliminary hearing, indictment, information, or arraignment. **Rothegery** rejected precedent holding that adversarial proceedings commence only where there is "significant prosecutorial involvement" in the proceedings.

Here, adversarial judicial proceedings did not commence when police officers obtained an arrest warrant, arrested defendant, and failed to bring him before a judge for eight days. Under **Rothegery**, an appearance before a judicial officer is required to trigger adversarial judicial proceedings; the delay in taking defendant before a judge, though improper under Illinois law, did not trigger the constitutional right to counsel.

Because defendant's constitutional right to counsel had not attached, no Sixth Amendment violation occurred when counsel was excluded from the room in which lineup witnesses identified defendant.

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Showups

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§27-4

Photographic Identification

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1. 725 ILCS 5/107A-5(a) provides that all lineups must be photographed, and that such photographs and any photographs shown to eyewitnesses during photo spreads must be disclosed during discovery. Section 107A-5 was violated where defense counsel requested a photo array that had been shown to eyewitnesses, but the State could not tender a copy of the array because it had been lost after a co-defendant's trial.

2. As a matter of first impression, the court concluded that although §107A-5 was violated, suppression of testimony concerning the photo array was not mandated. The court found that §107A-5 is directory rather than mandatory.

Statutory language is presumed to be directory unless: (1) the statute prohibits further action in the event of noncompliance, or (2) the right protected by the statute would be harmed under a directory reading. The statutory language of §107A-5 does not prohibit further proceedings in the event the State fails to disclose a photo array. Furthermore, although the statute is intended to protect a fair trial, admission of a suggestive photo array constitutes reversible error only if the defendant was prejudiced.

Because defendant gave a statement admitting that he had been the shooter, and he was identified as the shooter by two eyewitnesses, the court concluded that there was at most minimal prejudice from the admission of testimony concerning the photo array. Because the right to a fair trial was not affected by the failure to disclose the array, a directory reading of §107A-5 was appropriate.

The court noted, however, that the State's failure to preserve the photo array was "very disturbing." Furthermore, in a case in which the evidence in a case is closely balanced, "it may be that the correct remedy is to suppress the identification testimony."

3. The court rejected defendant's argument that apart from §107A-5, as a matter of common law the trial court should have suppressed testimony concerning the lost photo array and the subsequent lineup identifications. The mere fact that the photographs were lost does not justify reversal of the conviction; unless bad faith is shown, the failure to preserve potential evidence does not deny due process. Instead, the relevant question is whether under the totality of the circumstances the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

The trial court found that the loss of the photo array was inadvertent, and that the State diligently attempted to track down the array once it was discovered to be missing. In addition, there was testimony that the array was composed of similar-sized photographs of males of the same age and general appearance as the defendant. The court concluded that under these circumstances, the trial court's finding upholding the identification procedure was not against the manifest weight of the evidence.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Kerry Goettsch, Elgin.)

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§27-5 Lineups

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§27-6 In-Court Identifications

People v. Tomei, 2013 IL App (1st) 112632 (No. 1-11-2632, 2/15/13)

Five factors are used by Illinois courts to evaluate the reliability of an eyewitness identification: (1) the witness's opportunity to view the suspect during the offense; (2) the witness's degree of attention; (3) the accuracy of any prior descriptions; (4) the witness's level of certainty at the time of the identification; and (5) the length of time between the crime and the identification. The court concluded that the identification in this case was sufficient to prove beyond a reasonable doubt that defendant was guilty of criminal trespass to property and criminal damage to property.

1. The first factor was satisfied in that the witness had an adequate opportunity to view the crime although he observed the offense at his home over a live video feed from his business. When considering whether a witness had an adequate opportunity to view the offender at the time of the offense, courts consider whether the witness was close to the accused for a sufficient period of time under conditions adequate for observation. Here, the witness testified that he observed the suspects over a live video feed as they were committing the crimes at his business, that the camera was positioned eight feet off the ground with spotlights that brightened the field of vision, and that the feed was sufficiently clear that he recognized the defendant's face. In addition, a few minutes later he identified defendant after the latter's apprehension by police. The court concluded that under these circumstances, the witness had an adequate opportunity to observe the crime.

The court rejected the argument that the identification was unreliable because the State offered no evidence of the size, clarity, resolution, or zoom of the live video feed. The court analogized the situation to viewing a crime through a telescope. "As long as the telescope was functioning properly, we see no reason why [the witness] would not be able to testify as to what [he or she] observed."

The court also found that the identification testimony did not require foundational proof that the video camera was functioning properly. First, even had there been evidentiary flaws in the foundation, those flaws would have gone only to the weight of the testimony and not to its admissibility. Second, viewing the facts in a light most favorable to the prosecution, in the absence of any evidence that the camera system was malfunctioning there was sufficient evidence for a rational trier of fact to conclude that the camera system was working properly.

2. The second factor was satisfied in that the witness was shown to have paid attention to the video although he was talking to a police dispatcher on the telephone and dressing to go to the crime scene. The witness testified he viewed the feed for a few minutes and recognized the defendant's face at the showup a few minutes later. The court concluded that a rational trier of fact could have concluded that the witness paid sufficient attention to make a positive identification.

3. The third factor was satisfied because the witness gave an adequate description to support the identification. The witness stated that the perpetrators were white males wearing short jackets and dark hats. Despite minor discrepancies, the court concluded that the general descriptions were adequate to allow the trier of fact to find that the identification was reliable.

4. Concerning the witness's level of certainty in the identification, the court found that the witness expressed no uncertainty. The court distinguished this case from those cited by the defendant, in which the defendant was precluded by the trial court from presenting expert evidence concerning the

ability of an eyewitness to make an identification. Here, defendant did not attempt to present such evidence and the trial court did not exclude it. Given that the witness consistently claimed that he was able to identify defendant, this factor was satisfied.

5. The amount of time between the crime and the identification indicated a reliable identification where only 15 minutes elapsed and the defense did not claim that the passage of time affected the identification. The court rejected the argument that the identification was unreliable because it occurred during a showup. The court concluded that the evidence was sufficient to permit a reasonable trier of fact to find that the identification was reliable.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

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§27-7

Expert Testimony

People v. Starks, 2014 IL App (1st) 121169 (No. 1-12-1169, 6/4/14)

The court noted that numerous studies have indicated that there is significant potential for error in eyewitness identifications and that jurors have misconceptions about the reliability of eyewitness testimony. In addition, whether trial courts should admit expert testimony on the reliability of eyewitness identification is a rapidly evolving area of the law.

Although the trial court has broad discretion in determining the admissibility of expert testimony, the record showed that the judge rejected the motion without considering the relevance of the evidence in light of the facts of this case. Because the conviction was being reversed on other grounds, the court directed the trial court to give serious consideration to defendant's request to present expert testimony on eyewitness identification.

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

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